IN THE SUPREME COURT OF MISSOURI

Supreme Court No.: SC 84933

LAURA LANDMAN
Employee/Respondent-Cross Appellant,

v.

ICE CREAM SPECIALTIES, INC.,
Employer/Appellant-Cross Respondent,
and
OLD REPUBLIC INSURANCE COMPANY,
Insurer/Appellant-Cross Respondent

APPELLANTS'-CROSS RESPONDENTS' ICE CREAM SPECIALTIES, INC. AND OLD REPUBLIC INSURANCE COMPANY'S SUBSTITUTE REPLY BRIEF IN RESPONSE TO THE BRIEF FILED BY EMPLOYEE/RESPONDENT

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ARGUMENT

Introduction

In their Substitute Reply Brief In Response To The Brief Filed By Claimant Laura Landman, Appellants Ice Cream Specialties, Inc. and Old Republic Insurance Company (hereinafter "employer" or "ICS") will limit their arguments to the most salient points contained in the Substitute Respondent's Brief filed on behalf of claimant Laura Landman (hereinafter "claimant" or "employee"). Such limitation, however, should not be understood as an abandonment of any argument previously asserted by ICS.

Statement Of Facts

Before addressing the merits of claimant's Substitute Respondent's Brief, employer will discuss the deficiency of the Statement Of Facts contained therein. Rule 84.04 prescribes the requirements for appellate briefs. ***Vodicka v. Upjohn***, 869 S.W.2d 258, 260 (Mo.App.S.D.1994). The requirements of Rule 84.04 are mandatory and, absent substantial compliance, nothing is preserved for appellate review. ***Jefferson v. Bick***, 872 S.W.2d 115, 118 (Mo.App.E.D.1994).

Rule 84.04 governs the nature of the statement of facts to be included in an appellate brief. It requires the statement of facts to be a fair and concise statement of the facts relevant to the questions presented for determination, without argument. Mo.R.Civ.Pro. R.84.04; ***Decker v. National Accounts Payable***, 993 S.W.2d 518, 521 (Mo.App.S.D.1999). The primary purpose of the statement of facts in an appellate brief is to afford an immediate, accurate, complete and unbiased understanding of the facts of the case. ***Id.***; ***Snelling v.***

Southwestern Bell, 996 S.W.2d 601, 603 (Mo.App.E.D.1999).

The Statement Of Facts contained in claimant's Substitute Respondent's Brief fails to satisfy the requirements of Rule 84.04(c), in particular the requirement that a statement of facts be without argument. Claimant's Statement Of Facts is replete with argument. It contains facts favorable to claimant, while omitting significant evidence essential to the position of ICS. ***Vodicka***, 869 S.W.2d at 263; ***Brancato v. Wholesale Tool***, 950 S.W.2d 551, 555 (Mo.App.E.D.1997); ***Federbush v. Federbush***, 667 S.W.2d 457, 458 (Mo.App.E.D.1984). Further, the Statement Of Facts opts for conclusions, rather than an accurate statement of the facts giving rise to the controversy and the testimony presented at hearing. As such, it leaves the Court with no intelligent understanding of the facts of the case. ***Vodicka***, 869 S.W.2d at 264.

A statement of facts of this nature does not comply with the requirements of Rule 84.04(c). ***Geiler v. Boyer***, 483 S.W.2d 773, 774 (Mo.App.W.D.1972). For this reason, employer respectfully requests that the Court strike the Statement Of Facts contained in claimant's Substitute Respondent's Brief. Employer refers the Court to the Statement Of Facts set forth on pages 12 to 33 of its Substitute Appellants' Brief.

I.

REPLY TO CLAIMANT'S ARGUMENT THAT THE COMMISSION DID NOT ERR IN FINDING EMPLOYER'S DEFENSE OF THE 1997 AND 1999 CLAIMS WITHOUT REASONABLE GROUND AND THAT THE COMMISSION'S AWARD OF COSTS UNDER SECTION 287.560 SHOULD HAVE INCLUDED ATTORNEY'S FEES.

Introduction

In her Substitute Respondent's Brief, claimant asserts that the Commission should have awarded her attorney's fees as part of the cost of the proceedings on her Claims under Section 287.560. Such an award is appropriate, claimant contends, since attorney's fees may be obtained as part of the "cost of recovery" under Section 287.203 and ***PM v. Metromedia***, 931 S.W.2d 846 (Mo.App.E.D.1996), and since attorney's fees may be awarded as sanctions under Rule 57 and 61.01 of the Missouri Rules of Civil Procedure. (Claimant's Brief,63-86).

Like the employee in ***Reese v. Coleman***, 990 S.W.2d 195, 200 (Mo.App.S.D.1999), claimant's request for attorney's fees is limited to Section 287.560. Claimant does not seek attorney's fees as the "cost of recovery" under Section 287.203, as did the employee in ***PM v. Metromedia***. ***PM***, 931 S.W.2d at 848. Nor does claimant rely upon any other provision of the Workers' Compensation Act as authority for the award of attorney's fees that she seeks.

The Commission only possesses such jurisdiction as is conferred upon it by statute. ***State ex rel Lakeman v. Siedelik***, 872 S.W.2d 503, 505 (Mo.App.W.D.1994); ***Clanton v. Teledyne Neosho***, 960 S.W.2d 532, 534 (Mo.App.S.D.1998). Neither Section 287.560 nor

Missouri case law conferred upon the Commission the authority to award attorney's fees to claimant as part of the "whole cost of the proceedings." ***Reese***, 990 S.W.2d at 201. Consequently, claimant was barred from recovering attorney's fees under Section 287.560 as a matter of law and the Commission did not err in denying her request. ***Id***.

In arguing that the Commission erred in failing to award her attorney's fees under Section 287.560 and asserting that this Court should refuse to follow the rule of law pronounced in ***Reese***, claimant is asking this Court to reject its long-standing authority on the construction of cost statutes as well as the recovery of attorney's fees in civil actions. Claimant fails to acknowledge that the holding in ***Reese*** is in accord with Missouri Supreme Court decisions on costs and recovery of attorney's fees.

The employee fails to provide any cogent or persuasive reason why this Court should depart from its long-standing rulings that statutes allowing for the taxation of costs are to be strictly construed and that no item is taxable as costs unless specifically so provided by statute. *See, e.g.*, ***City of St. Louis v. Meintz***, 18 S.W.3d 30, 31 (Mo.1891); ***Townsend v. Boatmens National Bank***, 159 S.W.2d 626, 628 (Mo.1942). Likewise, claimant fails to offer any compelling argument as to why the Court should reject the American Rule, providing that attorney's fees may only be recovered if they are provided for by contract or statute, where they are incurred because of involvement in collateral litigation or where they are ordered by a court of equity to balance the benefits between parties, long adhered to by this Court. *See*, ***Mayor, Councilmen and Citizens of the City of Liberty v. Beard***, 636 S.W.2d 330, 331

(Mo.banc 1892); ***County Court of Washington County v. Murphy***, 658 S.W.2d 14, 16; ***Harris v. Union Electric***, 766 S.W.2d 80, 89 (Mo.banc 1989). Like the Eastern District's Opinion below, claimant's analysis fails to disclose any reasonable basis for departing from the Supreme Court's long-standing precedent on the construction of cost statutes and the application of the American Rule regarding attorney's fees. For this reason, the Court should reject claimant's arguments, and adopt the holding in ***Reese***, which is entirely in keeping with the Supreme Court's prior rulings on costs and attorney's fees.

Claimant argues that Section 287.560 does not have to be strictly construed, as are other cost statutes. She asserts that Section 287.800, mandating that the Act be liberally construed with a view to the public welfare, supports an award of attorney's fees under Section 287.560. (Claimant's Brief,66-68). However, Section 287.800 does not authorize an extension of the terms of the Workers' Compensation Act beyond their plain meaning. ***State ex rel Sei v. Haid***, 61 S.W.2d 950, 954 (Mo.1933).

Attorney's Fees Are Not Available To Claimant

Under The Missouri Rules Of Civil Procedure

In her Substitute Respondent's Brief, claimant argues that an award of attorney's fees is appropriate as a sanction under Rules 61.01 and 57.03 of the Missouri Rules of Civil Procedure. (Claimant's Brief,83-84). Claimant contends that since Rule 57 applies to the use of depositions in workers' compensation cases and Rule 57.03 provides that a court may award sanctions as provided for in Rule 61.01(d) and (g), said sanctions to include attorney's fees,

an award of attorney's fees would be appropriate under these Civil Rules, as well as Rule 55.03(b). (Claimant's Brief,78-84). These arguments are without merit and must be rejected.

The Workers' Compensation Act is not supplemental or declaratory of any existing rule, right or remedy, but creates an entirely new right or remedy that is wholly substitutional in character and supplants all other rights and remedies, where an employer and employee have elected to accept the Act or are subject thereto by operation of law. ***State ex rel. McDonnell Douglas v. Ryan***, 745 S.W.2d 152, 153 (Mo. banc 1988). As a creature of statute, workers' compensation law is governed by Chapter 287, RSMo. ***Farmer v. Barlow,*** 979 S.W.2d 169, 170 (Mo.banc 1998).

Rights of the parties under the Workers' Compensation Act and the manner of procedure thereunder must be determined by the provisions of the Act. ***Kristanik v. Chevrolet***, 41 S.W.2d 911, 912 (Mo.App.E.D.1931). The Workers' Compensation Act is an exclusive and complete code and provides for its own procedure. ***Groce v. Pyle***, 315 S.W.2d 482, 492 (Mo.App.W.D.1958); ***Kristanik***, 41 S.W.2d at 912. Consequently, the Missouri Rules of Civil Procedure are inapplicable in workers' compensation cases. ***Id.***; ***Meek v. Pizza Inn***, 903 S.W.2d 541, 544 (Mo.App.W.D.1995) (civil rules do not apply to administrative proceedings; Rule 41.01, which lists the types of actions to which the Supreme Court Rules are applicable, does not make any mention of administrative actions, such as workers' compensation cases).

Contrary to claimant's contention, neither ***State ex rel. McConaha v. Allen***, 979

S.W.2d 188, 189 (Mo.banc.1998), nor ***Fisher v. Waste Management***, 58 S.W.3d 523 (Mo.banc 2000) supports an award of attorney's fees in the instant case. ***McConaha*** held that the rules of civil procedure governing depositions in civil actions also applied to depositions taken in workers' compensation cases pursuant to Section 287.560. The Court limited its holding, stating that it was not addressing or deciding the question of what rules of civil procedure, other than those that apply to depositions, were applicable in proceedings before the Division of Workers' Compensation. ***McConaha***, 979 S.W.2d at 189.

The sole issue in ***Fisher***, 58 S.W.3d at 524, was whether a surveillance video tape, which did not contain an audio component, constituted a "statement" within the meaning of Section 287.215 that was required to be produced by an employer after a written request was made by the employee's counsel for employee statements. Given the limited holdings in ***McConaha*** and ***Fisher***, these decisions do not authorize an award of attorney's fees under Section 287.560. ***McConaha***, 979 S.W.2d at 189; ***Fisher***, 58 S.W.3d at 527.

The Rules of Civil Procedure relied upon by claimant are inapplicable to the instant facts. The conduct of ICS at issue herein is its failure to pay medical expenses, provide medical treatment, and pay temporary total disability benefits, as well as its challenge to the causation of claimant's venous stasis condition, not the questioning of a witness at deposition, the conduct to which Rules 57.03 and 61.01(g) apply. Mo.R.Civ.Pro. R.57.03(e); R.61.01(g).

Rule 57.03(e) governs motions to limit or terminate depositions where the examination

of a witness is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the deponent or a party in the case. Mo.R.Civ.Pro. R.57.03(e). It permits a party to file a motion requesting that the examination cease or that it be limited in scope. ***Id***. Pursuant to Rule 57.03(e), the provisions of Rule 61.01(g) apply to the award of expenses "incurred in relation to the motion." ***Id***. Relatedly, Rule 61.01(g) provides that a party may recover the "reasonable expenses incurred" in either obtaining an order or opposing a motion, said expenses to include attorney's fees. Mo.R.Civ.Pro. R.61.01(g).

Claimant asserts that the need to take the depositions of Drs. Poetz and Altesheler arose, in part, from ICS's refusal to pay temporary total disability and provide medical care without reasonable cause (Claimant's Brief,84). But claimant makes no assertion that the examination of these witnesses was somehow conducted in bad faith or in such a manner as to embarrass or oppress the deponents or a party in the case, the type of conduct to which Rule 57.03 and 61.01(g) is applicable.

No Missouri court has held that Rule 57.03(e) or Rule 61.01(g) applies in the workers' compensation context. Given this fact, and the fact that the circumstances in the instant case are not those to which the rule is applicable, it necessarily follows that Rules 57.03(e) and 61.01(g) do not authorize an award of attorney's fees under Section 287.560.

Claimant's assertion that an examination of Rule 55.03(b) shows that costs should be assessed under Rule 287.560 also fails. (Claimant's Brief,78-83). Rule 55.03(b) pertains to representations made to the court in pleadings filed by attorneys in civil actions. Mo.R.Civ.Pro. R. 55.03(b). No Missouri court has applied Rule 55.03(b) in the workers'

compensation context. To do so would contravene cases holding that civil pleading rules are not applicable to pleadings filed in workers' compensation actions. *See*, ***Balsamo v. Fisher***, 481 S.W.2d 536, 538 (Mo.App.E.D.1972); ***Groce***, 315 S.W.2d at 492; ***Lloyd v. Ozark Electric***, 4 S.W.3d 579, 586 (Mo.App.S.D.1999). For these reasons, and because the Rules of Civil Procedure are not applicable in workers' compensation cases, claimant's argument must be rejected. ***Groce***, 315 S.W.2d at 492.

Claimant May Not Recover The Cost

Of Dr. Poetz' and Dr. Altesheler's Depositions

The Commission did not err in refusing to award claimant the cost of the court reporters' charges for the depositions of Dr. Altesheler and Dr. Poetz.[1] As claimant concedes, the court reporters' charges for the depositions of Drs. Poetz and Altesheler were not

[1] The Court of Appeals so found in its Opinion. (Opinion,20-21). It ruled that there was no direct evidence of the cost of the transcripts. Even though the transcripts themselves were in evidence and an estimation of their cost perhaps could have been calculated using a standard rate for transcription, there was no evidence of that rate. (Opinion,21). As the Eastern District found, some evidence of Dr. Altesheler's deposition fee was in the record, but only in a letter attached to his deposition transcript enclosing a check payable to the doctor for the estimated time he would spend giving his deposition. None of this was overwhelming evidence contrary to the Commission's finding that there was no specific proof of claimant's costs of the proceedings. (Opinion,20).

introduced into evidence at hearing. (Claimant's Brief,85). Claimant's inclusion of the court reporters' bills in the Appendix of her Commission Brief did not serve to render them part of the record on appeal, as she implies. (Claimant's Brief,85). ***In re Carl McDonald Revocable Trust v. McDonald***, 942 S.W.2d 926, 932 (Mo.App.S.D.1997) (contingent beneficiary's mere inclusion of partial original trust agreement and first trust amendment as part of the appendix to its brief did not make those documents part of the record on appeal). Since the court reporter's bills were not contained in the record before the Commission, it properly denied reimbursement for these charges. ***Id***.

Upon an application for review, the Commission can confine its review to the evidence already taken or open the record for additional evidence upon the motion of a party. RSMo. §287.480; ***Clark v. Frazier-Davis***, 258 S.W.2d 934, 937 (Mo.App.E.D.1953). Where, as here, no motion to present additional evidence is filed, the Commission can only review the evidence presented to the ALJ at hearing. ***Hartley v. Spring River Christian Village***, 941 S.W.2d 4, 7 (Mo.App.S.D.1997). The Commission cannot rely upon evidence outside the record. ***Id***. Because the court reporters' bills were outside the record, it necessarily follows that the Commission could not consider those bills. Therefore, it did not err in refusing to assess an award of costs for the bills. ***Id***.

Employer respectfully submits that this Court may not award claimant the charges for the court reporters' preparation of the transcripts for Dr. Altesheler and Dr. Poetz' depositions. Since those charges were outside the record on appeal, this Court may not

consider them for any purpose. ***8182 Maryland Associates v. Sheehan***, 14 S.W.3d 576, 587 (Mo.banc 2000) (appellate court will not consider evidence outside the record on appeal); ***In re McDonald Revocable Trust***, 942 S.W.2d at 932.

Section 287.203 And *PM v. Metromedia* Do Not

Authorize An Award Of Fees Under 287.560

Claimant contends that because ***PM v. Metromedia Steakhouses***, 931 S.W.2d 846, 849 (Mo.App.E.D.1996), held that the "cost of recovery" under Section 287.203 includes attorney's fees, such fees should be recoverable as a "cost of the proceedings" under Section 287.560. (Claimant's brief,63-64). In ***Reese***, the Southern District rejected this same argument. ***Reese***, 990 S.W.2d at 200-201.

In doing so, the Southern District noted that ***PM*** involved a proceeding brought under Section 287.203, wherein an employee claimed that compensation benefits she had been receiving were wrongfully terminated. ***Reese***, 990 S.W.2d at 200. As the ***Reese*** court observed, ***PM*** held that the phrase "cost of recovery" in Section 287.203 included attorney's fees, finding that the phrase "contemplates an award of attorney's fees on its face, since legal fees are unquestionably the largest cost incurred when an employee is forced to sue to recover a Workers' Compensation award." ***PM***, 931 S.W.2d at 849; as quoted in ***Reese***, 990 S.W.2d at 200-201.

However, the ***Reese*** court was not convinced that the reasoning in ***PM*** was applicable to the case before it. The statute interpreted in ***PM***, Section 287.203, was different from the

controlling statute therein - 287.560. The language in the two statutes concerning what was recoverable differed. While Section 287.203 permitted recovery of a claimant's "cost of recovery," Section 287.560 permitted assessment of the "cost of the proceedings." ***Reese***, 990 S.W.2d at 201. Had the legislature intended to permit the Commission to award recovery of the same items in both circumstances, it would have used the same language in the two statutes. But it did not. ***Reese***, 990 S.W.2d at 201. This difference between the language of 287.560 and 287.203 was evidence of the legislative intent that the same items were not to be recovered as costs thereunder. The reasoning in ***Reese*** applies with equal force to the instant case. ***Id***.

Claimant contends that "it has been established that "cost of recovery" under §287.203 does includes attorney's fees," since this Court denied transfer of the ***PM*** decision. (Claimant's Brief,64). That the Supreme Court denied transfer in ***PM*** is not tantamount to a decision from this Court holding that "cost of recovery" under Section 287.203 includes attorney's fees. As with the issue of whether "the whole cost of the proceedings" as used in Section 287.560 includes attorney's fees, the instant Court has yet to address the issue of whether Section 287.203 authorizes the Commission to award attorney's fees to a prevailing party as part of the "cost of recovery."

Employer's Defense To The Claims Was Taken With Reasonable Grounds

In her Brief, claimant asserts that an award of costs under Section 287.560 is appropriate because the employer's behavior in this matter has been contemptible and

reprehensible. (Claimant's Brief,51-63).[2] In condemning ICS' defense of the 1997 and 1999 Claims, the employee fails to acknowledge significant facts and matters of law.

Initially, claimant fails to take into account the fact that the Workers' Compensation Act places the burden of proving the elements of a claim for compensation on the employee. In the instant case, this meant that it was claimant's burden of proving her entitlement to temporary total disability, permanent disability, past medical expenses and future medical treatment. ***Fischer v. Archdiocese of St. Louis***, 793 S.W.2d 195, 198 (Mo.App.E.D.1990). Given this burden of proof, ICS had the right to insist that the employee prove her Claims.

The employee takes issue with ICS' delay in paying her temporary total disability benefits on the 1997 Claim for the period from August 11, 1999 through March 3, 2000 until after the case was mediated before ALJ Percy. (Claimant's Brief,54-55). What claimant fails to acknowledge is that ICS delayed paying these benefits because it was disputing treatment on the shoulder, as it had a right to do under the Act. Likewise, ICS initially denied temporary total disability for the period from March 18, 1999 to July 14, 1999, since its physician at BarnesCare found claimant's leg problems to be unrelated to her work. (Tr.449-453). ICS

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[2] Claimant's assertion that ALJ Newcomb found ICS' defense of the 1997 Claim to be "so reprehensible that it should be referred to the fraud and non-compliant unit for possible prosecution," (Claimant's Brief,49) distorts the record. ALJ Newcomb did not make such a finding. Rather, the ALJ concluded that while Section 497.128 "may" have been violated, the Division did not have jurisdiction to determine that issue. (L.F.10-29).

relied upon the opinion of its physician, as it had a right to do. In claimant's opinion, however, ICS acted in a contemptible and reprehensible manner in exercising its rights under the Act and in relying upon the opinion of its physicians.

Further, claimant asserts that ICS engaged in "hiding and concealing medical reports of its examining physicians," despite six separate requests for the same. (Claimant's Brief,52). Two requests were made to defense counsel for this report in February and March of 2000. However, it appears that defense counsel did not receive this report until some time after May 10, 2000. Employer's counsel could not hide or conceal a report not in his possession. And, while claimant's attorney sent correspondence to the insurance company on February 10, 2000 and again on March 21, 2000, he did not request a copy of Dr. Petkovitch's report in that correspondence.

In her analysis regarding the reasonableness of the employer's defense to her Claims, the employee fails to distinguish between the acts purportedly taken by ICS in defense of the 1997 Claim and those allegedly taken by ICS in defense of the 1999 Claim. By discussing ICS' defense to the Claims in this confusing manner, claimant attempts to distract the Court's attention away from the fact that the Commission's Award did not find ICS' defense in either Claim to be unreasonable in its entirety. Rather, the Commission's award of costs on the 1997 Claim was based solely on one aspect of the employer's defense therein, that being its failure to provide medical treatment for claimant's shoulder condition. (L.F.37-57). As to the 1999 Claim, the Commission found that ICS was "unreasonable" in raising the issue as to the medical causation of claimant's venous stasis condition. (Tr.97-124). The Commission found

that the degree of claimant's disability and which party was liable to claimant were valid issues for its consideration. (Tr.97-124). ICS' defense on the 1999 Claim addressed both of these issues.[3]

Besides her failure to acknowledge that the employer's defense, as a whole, on the 1997 and 1999 Claims was not taken without reasonable ground, the employee chooses to overlook the fact that employer provided medical treatment to claimant following both the 1997 and the 1999 accidents and that ICS paid temporary total disability benefits to claimant on the 1997 Claim, in the amount of $13,780.22. Claimant would have this Court believe that ICS has paid no benefits on either Claim. This is simply not the truth.

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[3] Employer contended that the Fund should be liable for claimant's permanent total disability on the 1999 Claim, since that total disability was due to a combination of claimant's injuries and impairments. Below, and in her Brief, claimant makes a similar argument - that the Fund should be liable to her for permanent total disability due to the combination of her venous stasis condition with her pre-existing obesity and left shoulder injury. (Claimant's Brief,99-101). In raising the same argument on Fund liability as that asserted by ICS, claimant tacitly concedes that ICS' position on the Fund's liability was taken with reasonable ground, within the meaning of Section 287.560.

II.

REPLY TO CLAIMANT'S ARGUMENT THAT THE INDUSTRIAL COMMISSION DID NOT ERR IN FINDING ICS LIABLE FOR PERMANENT TOTAL DISABILITY ON THE 1999 CLAIM.

Introduction

Claimant misstates the applicable standard governing this Court's review. She fails to acknowledge that the Court may set aside the Commission's award of permanent total disability if that award is contrary to the overwhelming weight of the evidence. ***Chatmon v. St. Charles County Ambulance***, 55 S.W.3d 451, 455 (Mo.App.E.D.2001). This standard of review applies to the Commission's acceptance or rejection of a witness' testimony. ***Hall v. Wagner***, 755 S.W.2d 594, 596 (Mo.App.E.D.1988). Thus, contrary to claimant's suggestion, this Court may set aside the Commission's finding that the testimony of Dr. Altesheler was more credible on the issue of permanent total disability than that of Dr. Poetz and James England, if that finding was contrary to the overwhelming weight of the evidence in the record. ***Hall***, 755 S.W.2d at 596; ***Page v. Green***, 686 S.W.2d 528, 530 (Mo.App.S.D.1985).

Claimant's Venous Stasis Condition Was Not The Last Injury For Fund Purposes

In her Brief, claimant contends that the threshold inquiry is the disability arising from the last injury alone. She posits that ICS is liable for permanent total disability due to the seriousness of her limitations from the "primary injury considered alone," that injury being her venous stasis condition. (Claimant's Brief,91-94). The employee asserts that under the

analysis mandated by Section 287.220.1, there is no need to inquire as to her prior injuries and conditions. (Claimant's Brief,93). Claimant's analysis must be rejected. Her venous stasis condition was not the "last injury" for purposes of Fund liability under Section 287.220.

The employee's argument suffers from the same defect that plagues the Commission's Award on the 1999 Claim. Namely, claimant fails to recognize that the 1999 accident was the "last injury" for purposes of Fund liability and that her venous stasis condition pre-existed her 1999 work injury and resulted in a permanent, measurable and compensable disability prior to the 1999 accident, thus precluding it from being the "last injury" within the meaning of Section 287.220. Additionally, claimant ignores the fact that the pre-existing disability resulting from her venous stasis condition, when combined with the disability from her obesity and the shoulder injury resulting from the 1997 accident, rendered her permanently and totally disabled, thereby rendering the Fund liable under Section 287.220.

In deciding whether the Fund has any liability to an employee, the first determination is the degree of disability from the last injury. ***Hughey v. Chrysler***, 34 S.W.3d 845, 847 (Mo.App.E.D.2000). An employee's pre-existing disabilities are irrelevant until the employer's liability from the last injury is determined. ***Kizior v. TWA***, 5 S.W.3d 195, 201 (Mo.App.W.D.1999). Where claimant's last injury, alone, renders her permanently and totally disabled, the Fund has no liability and the employer is responsible for the entire amount. ***Hughey***, 34 S.W.3d at 847. Conversely, where an employee's permanent total disability arises from a combination of her injuries and impairments, the Fund is liable to the employee for that permanent total disability. ***Garibay v. Treasurer of Missouri***, 930 S.W.2d 57, 61

(Mo.App.E.D.1996).

Significantly, claimant overlooks the finding of fact made by the Commission that she sustained an accident on February 27, 1999. (L.F.97-124). When that accident took plade, claimant sustained an "injury" within the meaning of Section 287.020.2, in that she suffered a soft tissue injury to her left leg that resulted in a deep purple bruise and pain in that lower extremity. (Tr.33-34). ***Albert v. Krey***, 195 S.W.2d 890, 893 (Mo.App.E.D.1946). Dr. Poetz opined that claimant sustained an *additional* 10% permanent partial disability to her left lower extremity as a result of the 1999 accident. (Tr.202-203). That injury, not the injury resulting from claimant's venous stasis condition, was the "last injury" for purposes of determining Fund liability. RSMo. §287.220.1.

Claimant's venous stasis condition cannot be considered the "last injury" for purposes of Section 287.220 in that it pre-existed the 1999 work accident and resulted in a measurable, compensable disability prior to that accident. The employee ignores competent and substantial evidence in the record demonstrating this fact, including her own testimony. Dr. Poetz testified that as of July 26, 1997, claimant's venous stasis resulted in a "20% permanent partial disability to the lower right extremity pre-existing, and 20% of the lower left extremity pre-existing." (Tr.198,201-202).[4] Given Dr. Poetz' rating, it necessarily follows that claimant was

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[4]Claimant takes issue with the statement in ICS' Substitute Appellants' Brief, drawn from Dr. Poetz' testimony, that prior to the 1999 accident, claimant had a pre-existing venous stasis condition and that this condition resulted in a 20% permanent partial

"disabled" from her venous stasis condition prior to the 1999 accident.

Such a finding is entirely consistent with the meaning of the term "disability" as used within the workers' compensation context. Within this context, a disability is the inability to do something; a physical or mental illness; an injury or condition that incapacitates in any way. ***Loven v. Greene County***, 53 S.W.3d 278, 284-285 (Mo.App.S.D.2001).

The employee argues that her venous stasis condition was not disabling prior to 1999, since that condition did not cause her to miss any work. (Claimant's Brief,96-97). Under the

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disability to each lower extremity. She asserts that this statement is a "gross distortion of the record." (Claimant's Brief,95-96). As characterized by claimant, Dr. Poetz' testimony was that she suffered a 20% permanent partial disability of the body as a whole due to a predisposition for venous stasis condition. (Claimant's Brief,95). However, that was not what Dr. Poetz testified, as an examination of pages 201-202 of the transcript demonstrates. (Tr.201-202). Ironically, while claimant charges that ICS' description of Dr. Poetz' rating was a "gross distortion of the record" in that portion of her argument wherein she asserts that ICS should be liable for her permanent total disability, she relies upon Dr. Poetz' rating of 20% permanent partial disability to each lower extremity arising from her venous stasis condition for the purpose of proving a pre-existing disability to her lower extremities in that portion of her argument wherein she contends that the Fund is liable for permanent total disability. (Claimant's Brief,101). Claimant cannot have it both ways.

Workers' Compensation Act, however, it is not necessary for an employee to miss work before that employee is considered to be "disabled" from an occupational disease. ***Johnson v. Denton***, 911 S.W.2d 286, 287 (Mo.banc 1995); ***Coloney v. Accurate Superior Scale***, 952 S.W.2d 755, 760-761 (Mo.App.W.D.1997); ***Owens v. Norb Hackmann***, 979 S.W.2d 941, 943 (Mo.App.E.D.1998). Rather, an employee becomes "compensably injured" or "disabled" from an occupational disease when she is unable to perform certain job related activities, when the disease affects the employee's earning ability or when it requires the employee to seek medical treatment. ***Johnson***, 911 S.W.2d at 287; ***Coloney***, 952 S.W.2d at 760-761; ***Williams v. Long Warehouse***, 426 S.W.2d 725, 732 (Mo.App.E.D.1968).

If the Court utilizes the appropriate legal standard for determining when an occupational disease becomes "disabling," it will become apparent that claimant was "compensably injured" and "disabled" by her venous stasis condition prior to the February 1999 accident. It is undisputed that claimant sought medical treatment for her venous stasis condition several years before the 1999 work event. (Tr.28-29). ***Williams***, 426 S.W.2d at 732. Claimant testified that prior to February 1999, she worked slower than she otherwise would have due to lesions and leg swelling, that she had difficulty getting around at work, that climbing stairs at work caused her pain, and that she climbed the stairs at work more slowly due to her leg condition. (Tr.64,65-66,70,84). Thus, claimant's venous stasis condition affected her ability to work. ***Coloney***, 952 S.W.2d at 760; ***Loven***, 63 S.W.3d at 285. That claimant's pre-existing leg condition affected her earning ability is evidenced by Dr. Poetz' finding that as of July 1997,

claimant's pre-existing venous stasis condition resulted in a 20% permanent partial disability to each lower extremity. (Tr.198,201-202, 203). ***Johnson***, 911 S.W.2d at 287; ***Coloney***, 952 S.W.2d at 760.

For claimant to argue that her venous stasis condition only became a compensable disability in 1999 (Claimant's Brief,96-98), is to arbitrarily ignore her own testimony, along with that of Dr. Poetz. This evidence demonstrates that claimant's venous stasis condition pre-existed the 1999 accident and resulted in a permanent, measurable and compensable disability to each of claimant's lower extremities prior to that accident, thus precluding it from being the "last injury" for purposes of Fund liability under Section 287.220.

Claimant's Permanent Total Disability Arose

From A Combination Of Her Injuries And Impairments

The employee does not dispute that, prior to the 1997 and 1999 work accidents, she suffered from pre-existing morbid obesity and this condition constituted a hindrance or obstacle to claimant's employment or re-employment in the open labor market. RSMo. §287.220.1; ***Garibay***, 930 S.W.2d at 50. Dr. Poetz' found that, as of July 26, 1997, claimant had a 15% permanent partial disability to her body as a whole as a result of her pre-existing weight condition. (Tr.203-204). Claimant concedes this fact, along with the fact that as a result of the 1997 work accident, she sustained a 40% permanent partial disability to her left upper extremity at the level of the shoulder. (Tr 203). (Claimant's Brief,99-101).

What claimant fails to acknowledge is that it was her pre-existing venous stasis condition, when combined with the disability from her obesity condition and her shoulder

injury, that rendered her permanently and totally disabled, not her venous stasis condition alone. James England testified that claimant was permanently and totally disabled due to a combination of her leg problems, her shoulder problems, and her obesity. (Tr.111). In Mr. England's opinion, it was a combination of claimant's shoulder impairments and leg impairments that kept her from performing even sedentary employment. (Tr.109-110). Likewise, Dr. Poetz testified that claimant was permanently and totally disabled as a result of the combination of her left shoulder injury, her obesity, and the venous stasis condition in her lower extremities. (Tr.207-208).

Given this testimony and the fact that claimant's venous stasis condition pre-existed her 1999 work injury and was a permanent, measurable, compensable disability for Fund purposes within the meaning of Section 287.220.1, liability for claimant's permanent total disability lies with the Fund and not with ICS. ***Boring v. Treasurer of Missouri***, 947 S.W.2d 483, 489-490 (Mo.App.E.D.1997); ***Kizior***, 5 S.W.3d at 201; ***Messex v. Sachs,*** 989 S.W.2d 206, 214 (Mo.App.E.D.1999). Consequently, the Commission erred as a matter of law in finding ICS liable for permanent total disability on the 1999 claim. ***Id***.

III.

REPLY TO CLAIMANT'S ARGUMENT THAT THE COMMISSION DID NOT ERR IN AWARDING CLAIMANT FUTURE MEDICAL TREATMENT FOR HER LEFT SHOULDER INJURY RESULTING FROM THE 1997 ACCIDENT.

In her Substitute Respondent's Brief, claimant asserts that the Commission's award of future medical treatment for her shoulder injury is supported by her testimony and that of Dr. Poetz, along with the report of Dr. Petkovitch. (Claimant's Brief,102-111). As a matter of law, neither claimant's testimony nor Dr. Petkovitch's report constitutes competent or substantial evidence to support an award of future medical treatment. Nor do the records of Dr. Dusek support the award of future care for claimant's shoulder injury.

The employee contends that Dr. Petkovitch's report supports the Commission's award of future care. (Claimant's Brief,105-106). At best, however, Dr. Petkovitch's report merely demonstrates the *possibility* that claimant could require future medical treatment in the event that Dr. Petkovitch's tenuous diagnosis of "possible internal derangement left shoulder with a possible laberal tear or defect" was confirmed by subsequent testing. That an employee may or might have a possible need for future medical care does not constitute competent and substantial evidence to support an award of future medical treatment as a matter of law. ***Modlin v. Sunmark***, 699 S.W.2d 5, 7 (Mo.App.E.D.1985); ***Mathia v. Contract Freighters***, 929 S.W.2d 271, 277 (Mo.App.S.D.1996).

Nor does claimant's testimony regarding her shoulder symptoms and limitations constitute competent and substantial evidence to support the Commission's award of future

medical treatment. When future medical benefits are to be awarded, the medical care must of necessity flow from the accident, via evidence of a medical causal relationship between the condition and the compensable injury, before the employer is to be held responsible. ***Mickey v. City Wide Maintenance***, 996 S.W.2d 144, 149 (Mo.App.W.D.1999). Given the complicated nature of claimant's shoulder injury, her lay testimony was not competent to demonstrate the required causal connection. ***Silman v. William Montgomery***, 891 S.W.2d 173, 175-176 (Mo.App.E.D.1995).

Claimant's analysis misconstrues and misstates ICS' arguments regarding future medical treatment. ICS does not contend that the forms of medical treatment testified to by Dr. Poetz "would simply modify symptoms, as opposed to cure and relieve from the effects of the injury." (Claimant's Brief,109). To the contrary, ICS posits that since there is no evidence to demonstrate, to a reasonable probability, that the treatment modalities suggested by Dr. Poetz would be effective so as to "relieve" claimant from her shoulder injury, such treatment cannot be awarded under the Act. RSMo. §287.140; ***Mickey***, 996 S.W.2d at 149; ***Mathia***, 929 S.W.2d at 277. It is ICS' position that the future medical treatment suggested by Dr. Poetz is neither reasonable nor necessary to treat claimant's work related shoulder injury, as Section 287.140 requires. ***Modlin***, 699 S.W.2d at 7.

Continuing to misconstrue ICS' argument, claimant contends that ICS "basically takes the position that a physician continuing to prescribe a narcotic is not care." (Claimant's Brief,107). ICS does not argue that the prescription of narcotic medications is not "care."

Rather, ICS posits that there has been no showing, to a reasonable probability, that the medication in question is reasonable and necessary to cure or relieve claimant's work related shoulder injury so as to render ICS responsible for that treatment under the Act. RSMo. §287.140.1; ***Modlin***, 699 S.W.2d at 7.

In a further attempt to muddy the issue, claimant contends that ICS' refusal to pay was a major factor in her ability to obtain more care. (Claimant's Brief,107-108). The issue is not claimant's ability to pay for medical treatment that she desires, but whether the medical care she seeks is reasonable and necessary to treat her work related shoulder injury, so as to render ICS liable for that treatment under the Act. RSMo. §287.140.1. To the extent that claimant's argument relies on evidence and facts outside the record, employer respectfully submits that this evidence may not be considered by the Court. ***8182 Maryland Associates v. Sheehan***, 14 S.W.3d 576, 587 (Mo.banc 2000).

Further, claimant takes issue with ICS' argument that Dr. Dusek was not of the opinion that claimant required future medical treatment for her shoulder condition. She dismisses ICS' position as "simply an assumption." (Claimant's Brief,103). However, ICS' argument was based upon a reasonable inference drawn from Dr. Dusek's medical records. ***Marcus v. Steel Constructors***, 434 S.W.2d 475, 481 (Mo.1968). The inference drawn is that if Dr. Dusek believed that claimant needed additional medical treatment, he would have recommended such treatment and his failure to do so is evidence of his belief that claimant did not require future medical care for her shoulder injury. Since Dr. Dusek was claimant's treating physician, his

records are clearly entitled to great weight on the issue of future medical treatment.

Finally, claimant contends that there is "absolutely no evidence of any type indicating that Claimant does not continue to suffer pain and symptoms of her left shoulder that are amenable to some form of treatment." (Claimant's Brief,110). By purpose of this argument, claimant seeks to shift the burden of proof to ICS. But it is claimant's burden of proving, to a reasonable probability, that she was in need of additional medical treatment by reason of her work related shoulder injury. ***Modlin***, 699 S.W.2d at 7. It is not ICS' burden to prove that claimant is no longer suffering symptoms from her work injury and that no medical treatment for that injury is necessary. ***Id***.

CONCLUSION

For all the foregoing reasons, employer ICS and insurer Old Republic respectfully request that the Court reverse the Award of the Commission on the 1997 and 1999 Claims.

Respectfully submitted,
EVANS & DIXON

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CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this 3rd day of March, 2003 to: Mr. Michael Gerritzen, Attorney at Law, One Firstar Plaza, 505 North 7th Street, Suite 2505, St. Louis, MO 63101-1600 and Ms. Plia Lippman Cohen, Attorney at Law, Office of the Attorney General, Laclede Gas Building, 20th Floor, 720 Olive Street, St. Louis, MO 63101.

_____
Mary Anne Lindsey

CERTIFICATE OF COMPLIANCE

This Brief complies with Special Rule 1 and contains 7,054 words. To the best of my knowledge and belief the enclosed disc has been scanned and is virus-free.

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Mary Anne Lindsey